

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

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FILED
JAMES BOYD
CLERK
MD

TED MARCUM,
PETITIONER/APPELLANT, CASE NO. C-1-02-425
VS.

OHIO ADULT PAROLE AUTHORITY, HONORABLE JUDGE WEBER
RESPONDENT/APPELLEE.

MOTION REQUESTING AN EXTENTION OF TIME ON
FILING A NOTICE OF APPEAL

ON BEHALF OF APPELLANT:

TED MARCUM, # 549-841
ROSS CORRECTIONAL INST.
P.O. BOX 7010
CHILLICOTHE, OHIO 45601

ON BEHALF OF APPELLEE

MR. MARC DANN
OHIO ATTY. GENERAL
30 EAST BROAD STREET
COLUMBUS, OHIO 43215

(2)

MEMORANDUM

ON JULY 12TH, 2007, HONORABLE JUDGE WEBER ISSUED A WRITTEN OPINION IN THE ABOVE CAPTIONED CASE, "DENYING" PETITIONER/APPELLANT, TED MARCUM, PETITION FOR WRIT OF HABEAS CORPUS. THE COURT ADDITIONAL "DENIED" TO ISSUE A "CERTIFICATE OF APPEALABILITY," AND THE COURT RULED THAT AN APPEAL WOULD NOT BE "TAKEN IN GOOD FAITH." THUS, THE COURT HELD THE PETITIONER COULD NOT PROCEED ON APPEAL BY WAY OF IN FORMA PAUPERIS.

UPON RECEIVING THAT WRITTEN OPINION, PETITIONER IMMEDIATELY "TIMELY FILED" A MOTION FOR "RELIEF FROM JUDGMENT" (WITHIN TEN DAYS) PURSUANT TO FED. R. CIV. P. 60, WHICH TECHNICALLY TOLLS THE TIME PERIOD ON FILING A NOTICE OF APPEAL. (SEE: FED. R. APP. P. 4(a)(4)(A)(v)). PETITIONER ASKED THE COURT TO "VACATE" THE JUDGMENT "DENYING" HABEAS CORPUS RELIEF, AND ASKED THE COURT TO ISSUE THE WRIT RELYING UPON THE JUDGMENT AND OPINION OF THE SIXTH CIRCUIT COURT OF APPEALS RULING IN FRANKLIN VS. ANDERSON, (6TH CIR. 2006), 434 F.3d 412, 418-421. IN FRANKLIN, THE SIXTH CIRCUIT RULED THAT THE STATE RULES OF APPELLATE PRACTICE AND PROCEDURE

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IN OHIO, ON FILING APPLICATIONS FOR "REOPENING" OR "RECONSIDERATION" PURSUANT TO OHIO APP. RULES 14(B), 26(A), AND 26(B), WERE NOT AN "ADEQUATE" OR "FIRMLY ESTABLISHED" AND/OR "REGULARLY FOLLOWED REMEDY," UPON WHICH A FEDERAL DISTRICT COURT MAY RELY UPON TO PRECLUDE FEDERAL HABEAS CORPUS RELIEF, WHEN IT INVOLVES A "PROCEDURAL DEFAULT" FOR FAILING TO "TIMELY FILE" AN APPLICATION FOR REOPENING OR RECONSIDERATION.

THE SIXTH CIRCUIT SPECIFICALLY FOUND THAT THE OHIO SUPREME COURT HAD NOT STRICTLY APPLIED THE "NINETY DAY" TIME PERIOD ON FILING APPLICATIONS FOR "REOPENING" DURING THE YEARS OF 2000 UP TO 2004. THUS, THE SIXTH CIRCUIT REASONED THAT IN CASES WHERE AN APPLICANT FILED AN APPLICATION FOR REOPENING DURING THOSE YEARS, (WHO MISSED THE NINETY DAY TIME PERIOD), ARE ENTITLED TO BE HEARD ON THE MERITS OF THEIR UNDERLYING INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CLAIMS IN THEIR FEDERAL HABEAS CORPUS PROCEEDING. *Id.* AT: 418-421.

IN THE PRESENT CASE, PETITIONER, TED MARCUM FILED HIS MOTION FOR "RELIEF FROM JUDGMENT" RELYING UPON THE SIXTH

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CIRCUIT RULING IN FRANKLIN. PETITIONER STATED THAT HE FILED HIS APPLICATION FOR DELAYED RECONSIDERATION AND REOPENING, PURSUANT TO OHIO APP. RULES 14(B), 26(A), AND 26(B), FILED WITH THE OHIO COURT OF APPEALS, TWELFTH APPELLATE DISTRICT, IN OCTOBER OF 2001. THE TWELFTH DISTRICT APPLIED A PROCEDURAL BAR INVOKING THE "NINETY DAY" RULE, AND HELD THAT MARCUM FAILED TO ESTABLISH "GOOD CAUSE" TO EXCUSE THE NINETY DAY EXCEPTION. IN MAY OF 2002, THE OHIO SUPREME COURT DENIED TO HEAR MARCUM'S APPEAL. THUS, PETITIONER ASKED HONORABLE JUDGE WEBER TO "VACATE" THE ORDERING DENYING HABEAS RELIEF IN LIGHT OF THE FACT THAT THE OHIO REMEDY AS APPLIED BY THE OHIO COURTS DURING THE YEARS OF 2000 UP TO 2004, WAS/IS NOT AN "ADEQUATE" OR "FIRMLY ESTABLISHED," AND "REGULARLY FOLLOWED" STATE COURT REMEDY, UPON WHICH THIS FEDERAL COURT MAY RELY TO PRECLUDE FEDERAL HABEAS CORPUS RELIEF TO MARCUM. ALTERNATIVELY, IN LIGHT OF FRANKLIN, PETITIONER/MARCUM ASKED JUDGE WEBER TO GRANT HIM A "CERTIFICATE OF APPEALABILITY" BECAUSE AN APPEAL WOULD

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BE "TAKEN IN GOOD FAITH."

TURNING NOW TO THE MERITS INVOLVING THE INSTANT MOTION SEEKING AN ORDER TO "EXTEND" THE TIME PERIOD ON FILING A NOTICE OF APPEAL FROM THE ORIGINAL JULY 12TH, 2007 COURT ORDER. ASSUMING THAT THE COURT MAY NOT GRANT PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT, PETITIONER ASK THE COURT TO GRANT HIM AN EXTENSION OF TIME ON FILING A "NOTICE OF APPEAL" FOR AN ADDITIONAL THIRTY (30) DAY PERIOD (i.e., UP TO SEPTEMBER 10TH, 2007). ACCORDING TO FED. APP. R. 4(a)(5)(A)(ii), AUTHORIZES A U.S. DISTRICT COURT TO ENLARGE THE TIME PERIOD ON FILING A NOTICE OF APPEAL UP TO AN ADDITIONAL "THIRTY DAYS," BASED ON A SHOWING OF "... EXCUSABLE NEGLIGENCE OR GOOD CAUSE."

IN THE PRESENT CASE, PETITIONER NEEDS ADDITIONAL TIME TO FILE A NOTICE OF APPEAL BECAUSE: (1) PETITIONER NEEDS TO OBTAIN AN APPLICATION TO PROCEED IN FORMA PAUPERIS FROM THE CLERK OF THE U.S. DISTRICT COURT., (2) PETITIONER HAS NOT RECEIVED THE APPLICATION YET FROM THE CLERK., (3) PETITIONER CURRENTLY

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IS INDIGENT AND DOESN'T HAVE SUFFICIENT FUNDS IN HIS ACCOUNT ON THIS DATE, TO PAY POSTAL FEES TO MAIL OUT THE REQUIRED DOCUMENTS ON FILING WITH HIS NOTICE OF APPEAL PAPERS. FEDERAL RULES OF APPELLATE PROCEDURE REQUIRE COPIES OF THE JUDGMENT/OPINION FROM THE COURT BELOW TO BE FILED SIMULTANEOUSLY WITH THE NOTICE OF APPEAL. THUS, PETITIONER DOESN'T HAVE SUFFICIENT FUNDS TO PAY COPY FEES AND POSTAL FEES AT THE PRESENT TIME TO FILE THOSE DOCUMENTS AND EXHIBITS WITH HIS NOTICE OF APPEAL., (4) MARCUM HASN'T HAD SUFFICIENT TIME OR OPPORTUNITY TO PREPARE A "CERTIFICATE OF APPEALABILITY" MEMORANDUM FOR FILING WITH THE NOTICE OF APPEAL., AND (5) IN LIGHT OF THE FACT THAT THERE IS AN ACTIVE PENDING MOTION FOR RELIEF FROM JUDGMENT PENDING REVIEW ON THE COURT'S DOCKET, DEMONSTRATES "GOOD CAUSE" TO EXTEND THE TIME PERIOD ON FILING A NOTICE OF APPEAL FROM THE COURT'S INITIAL JULY 12TH, 2007 COURT JUDGMENT FOR AN ADDITIONAL THIRTY (30) DAYS. PETITIONER ASK THE COURT TO GRANT ANY OTHER EQUITABLE RELIEF.

RESPECTFULLY SUBMITTED,

Ted Marcum

TED MARCUM, # 549-841

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CERTIFICATE OF SERVICE

THIS IS HEREBY TO VERIFY THAT A TRUE EXACT COPY OF THE ABOVE FORGOING MOTION FOR EXTENTION OF TIME ON FILING A NOTICE OF APPEAL, HAS BEEN SENT TO MR. MARC DANN, OHIO ATTORNEY GENERAL, AT: 90 STATE OFFICE TOWER, 30 EAST BROAD STREET, COLUMBUS, OHIO 43215, ON THE 1ST DAY OF AUGUST, 2007, BY REGULAR FIRST CLASS MAIL, POSTAGE PRE-AFFIXED.

Ted Marcum

TED MARCUM, #549-841

AFFIDAVIT

AFFIANT, TED MARCUM, DOES HEREBY DECLARES UNDER PAINS AND PENALTY OF PERJURY, OR FALSIFICATION, THAT THE FACTS AND LEGAL ISSUES PRESENTED IN THIS MOTION FOR AN EXTENTION OF TIME, ARE HEREBY WHOLLY CORRECT AND TRUE TO THE BEST OF AFFIANT'S INTELLIGENCE AND BELIEFS.

JULY 31ST, 2007

EXECUTED ON

Ted Marcum

TED MARCUM, #549-841

ROSS CORRECTIONAL INST.

P.O. BOX 7010

CHILLICOTHE, OH 45601